

STATE OF NORTH DAKOTA
OFFICE OF ATTORNEY GENERAL

IN THE MATTER OF:

Thirstys LLC
Licensee of Thirstys
License No. AA-00902
Located at Devils Lake
Ramsey County, North Dakota

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**RECOMMENDED
FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND ORDER**

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The licensee, Thirstys LLC, was served with a Complaint and Specification of Issues and Notice of Hearing as required by N.D.C.C. ch. 5-02. This administrative matter was heard on December 5, 2002, at the hour of 1:00 p.m., at the Ramsey County Law Enforcement Center, Devils Lake, North Dakota, before Allen C. Hoberg, designated administrative law judge (ALJ), Office of Administrative Hearings. An attorney did not represent the licensee. The licensee was represented at the hearing by Sarah Bergeron, owner of Thirstys LLC. The State was represented by Assistant Attorney General, Robert P. Bennett. Four witnesses testified at the hearing, two law enforcement personnel, Ms. Bergerson, and an employee (bartender) of the Licensee. The State offered two exhibits as evidence at the hearing (exhibits 1-2), both of which were admitted (exhibits marked on red "State's Exhibit" stickers). The ALJ also took official notice of several documents, including the original Complaint and Specification of Issues and the Licensee's letter answer to the Complaint, which are the procedural history of this matter (red sticker marked "ON").

Both Mr. Bennett and Ms. Bergeron gave oral closing argument at the hearing.

NOW, THEREFORE, upon the evidence presented at the hearing and the argument of the parties, the ALJ makes the following recommended findings of fact and conclusions of law:

FINDINGS OF FACT

On August 21, 2002, Thirstys LLC was the holder of a state alcoholic beverage license permitting the sale of alcoholic beverages at retail from the premises of Thirstys, located in Devils Lake, North Dakota, Licensee No. AA-00902. Sarah Bergeron is the owner of Thirstys. She also works in the licensed retail establishment and was working there on August 21, 2002.

On August 21, 2002, the licensee, acting by and through its owner, Sarah Bergeron, dispensed alcoholic beverages from Thirstys to a person under twenty-one years of age and permitted that same person to remain on the licensed premises of Thirstys while alcoholic beverages were being sold or displayed.

COMMENTARY ON FINDINGS OF FACT

There is no doubt that a minor entered the premises of Thirstys on August 21, 2002. She was seen entering Thirstys by Devils Lake police who followed her onto the premises shortly thereafter. The evidence shows that on that date Ms. Bergeron dispensed alcoholic beverages to the minor on the licensed premises without asking for identification from the minor, and when police officers entered the premises the minor was sitting at the bar with an alcoholic beverage in front of her. After questioning by police, the minor was arrested, taken from the premises and transported to the Ramsey County Law Enforcement Center. The minor was later charged with the criminal violation of being a minor on the premises of a licensed retail alcoholic beverage establishment.

The evidence shows that on August 21, 2002, the minor was 18 years of age. The evidence shows that on at least two other occasions on the licensed premises of Thirstys the same minor was asked for identification and produced identification stating that she was at least twenty-one years of age. On those occasions, also, the minor was dispensed alcoholic beverages. Again, however, on August 21, 2002, the minor was not asked to produce identification. The evidence does not show that either on August 21, 2002, or at any other time, was the minor asked to write in a book showing the date of the purchase, the identification used in making the purchase and the appropriate numbers of such identification, the address of the purchaser, and the purchaser's signature. A book containing such information is commonly referred to as a "bar book." No one testified about whether the Licensee even had a bar book on the premises.

The appearance of the minor on August 21, 2002, was not such that an ordinary and prudent person would believe the minor to be of legal age to purchase alcoholic beverages in North Dakota, *i.e.*, 21 years of age. Both Ms. Bergeron and the other bartender testifying at the hearing said that the minor did not appear to be twenty-one years of age. Both police officers testifying at the hearing said that the minor did not appear to be twenty-one years of age. The minor does not appear to be twenty-one years of age. *See* exhibit 1, a picture taken of the minor on August 21, 2002, at the Ramsey County LEC. The minor appears to be, at most, 18 years of age. Again, the minor was 18 years of age on August 21, 2002.

From the foregoing findings of fact, the ALJ arrives at the following:

CONCLUSIONS OF LAW

Thirstys LLC is presently a licensed retailer of alcoholic beverages, operating under and by virtue of a state license to sell alcoholic beverages at retail, the license having been issued by the Attorney General pursuant to the provisions of N.D.C.C. ch. 5-02.

The evidence presented at the hearing shows, by the greater weight of the evidence, that the licensee, acting by and through its owner, did dispense alcoholic beverages to a person under the age of 21 years, and allowed that same person to remain on the licensed premises while alcoholic beverages were being sold or displayed, in violation of N.D.C.C. § 5-02-06.

N.D.C.C. § 5-01-08.2 is not a valid defense in this matter because the minor did not appear to be 21 years of age at the time of the purchase. No ordinary and prudent person would believe the minor to be 21 years of age. All three elements of the provisions of N.D.C.C. 5-01-08.2 must be established for a valid defense. *State v. Smokey's Steakhouse, Inc.*, 478 N.W. 2d 361 (N.D. 1991). The licensee established only one element at the hearing. N.D.C.C. § 5-01-08.2(1). The other two elements cannot be established if the person does not appear to be 21 years of age. N.D.C.C. § 5-01-08.2(2), (3). Moreover, a licensee that does not keep a book of the kind required by N.D.C.C. § 5-01-08.1 (a bar book) may not avail itself of the provisions of § 5-01-08.2. Those two sections must be considered together. *Ross v. Scott*, 386 N.W. 2d 18 (N.D. 1986).

The Attorney General has the authority, by virtue of N.D.C.C. § 5-02-11, to suspend or revoke the licensee's license to sell alcoholic beverages at retail when the violation charged in the affidavit of Complaint has been proved by the evidence presented at the hearing.

RECOMMENDED ORDER

THEREFORE, upon the foregoing findings of fact and conclusions of law, showing a violation of N.D.C.C. Title 5, the state retail alcoholic beverage license of Thirstys LLC is suspended for a period of five business days, but only one business day of the suspension shall be invoked at the present time, and the actual business day of closing shall be determined by the Attorney General in his final Order.

Dated at Bismarck, North Dakota this 11th day of December, 2002.

State of North Dakota
Wayne Stenehjem
Attorney General

By: _____
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